

June 24, 2021

**VIA ECF**

Honorable Edward S. Kiel, U.S.M.J.  
 United States District Court, District of New Jersey  
 United States Post Office & Courthouse  
 Federal Square, Courtroom 8  
 Newark, New Jersey 07101

Re: *In re Zytiga Litigation*  
 Master Docket No. 19-12107(KM)(ESK)  
*All Actions*

Dear Judge Kiel:

Pursuant to your direction, we are submitting herewith a proposed Discovery Confidentiality Order for the Court's consideration. We are pleased to advise that the parties have reached agreement on all provisions with the exception of certain language in paragraph 19.

Below is a chart in the form you requested laying out the position of each side.

***Plaintiff's Position:***

<b>Plaintiffs' Proposed Language:</b>	<b>Reason:</b>
<p>19. The parties have agreed that they do not intend to disclose Privileged Information in this Action. Pursuant to FRE 502(d) and 28 U.S. Code § 1738, any disclosure of Privileged Information ("Disclosed Privileged Information"), inadvertent or otherwise, shall not constitute in this or any other action a waiver or forfeiture of any privilege otherwise attaching to the Disclosed Privileged Information and its subject matter, <b>unless deemed by the Court to be a waiver or forfeiture</b>. This Order shall be enforceable and granted full faith and credit in all other state and federal proceedings. A party that produces documents or information subject to the attorney-client privilege or work-product immunity may request return of such documents or information after the Producing Party learns of its production. After receipt of such a request, the Receiving Party shall promptly return, sequester, or destroy the specified information and any copies of and notes pertaining to such information as soon as possible, and in any event within seven (7) days</p>	<p>Plaintiffs believe this paragraph should make clear that the Court retains the ability to review any disclosure to determine whether it constitutes waiver or forfeiture. This is consistent with Fed. R. Civ. P. 502, which provides the Court with the authority to review and rule on any such disclosures in the event of a challenge.</p> <p>Accordingly, the only dispute is this: Should this Court be absolutely prohibited by virtue of the protective order from assessing a party's production efforts in the context of a claw back? The Defendants say yes; the Plaintiffs believe the Court should, when exercising its discretion as to whether a Fed. R. Civ. P. 502 order is appropriate, retain its ability and authority to deem a disclosure a waiver or forfeiture of the privilege. The Plaintiffs' insert accomplishes this objective.</p>

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Plaintiffs' Proposed Language:	Reason:
<p>of receipt of such a request. For purposes of this section, it shall be irrelevant which party initially discovers the produced information, documents, or tangible items that are otherwise properly subject to a claim of attorney-client privilege, work product immunity, or any other protection from discovery. Any subsequent conflict of law analysis shall apply the law most protective of privilege and work product. For avoidance of doubt, nothing in this provision shall prevent any party from challenging another party's designation of information as privileged or subject to the attorney work product doctrine.</p>	
<p>Plaintiffs oppose the insertion of a sentence that reads, "Disclosed Privileged Information shall receive the maximum protection afforded by FRE 502(d)."</p>	<p>FRE 502(d) allows the Court to order that a privilege or protection "is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding." The Rule does not afford degrees of protection. The Rule also does not compel a specific result, instead it allows the Court to retain the authority and discretion to determine whether waiver or forfeiture has occurred in light of the circumstances. Accordingly, the language that the Defendants propose should not be included.</p>

***Defendant's Position:***

Defendants' Proposed Language	Reason
<p>19. The parties have agreed that they do not intend to disclose Privileged Information in this Action. Pursuant to FRE 502(d) and 28 U.S. Code § 1738, any disclosure of Privileged Information ("Disclosed Privileged Information"), inadvertent or otherwise, shall not constitute in this or any other action a waiver or forfeiture of any privilege otherwise attaching to the Disclosed Privileged Information and its subject matter. <b>Disclosed Privileged Information shall receive the maximum protection afforded by FRE 502(d).</b> This Order shall be enforceable and granted full</p>	<p>Defendants' proposed language mirrors that incorporated by default into this Court's scheduling orders. Civ. L.R. 16.1(b)(2)(i) ("The production of materials, inadvertent or otherwise, shall not be deemed a waiver of attorney-client privilege or work product protection in this civil action or in any other federal or State proceeding."). And both this Court's local rules and Defendants' proposal reflect model language from former United States Magistrate Judge and eDiscovery expert Andrew Peck, <i>see Commentary on Protection of Privileged ESI</i>, 17 Sedona Conf. J. 95, 198 (2016). Plaintiffs fail to articulate any reason to deviate from that industry-accepted standard, and courts are</p>

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Defendants' Proposed Language	Reason
<p>faith and credit in all other state and federal proceedings. A party that produces documents or information subject to the attorney-client privilege or work-product immunity may request return of such documents or information after the Producing Party learns of its production. After receipt of such a request, the Receiving Party shall promptly return, sequester, or destroy the specified information and any copies of and notes pertaining to such information as soon as possible, and in any event within seven (7) days of receipt of such a request. For purposes of this section, it shall be irrelevant which party initially discovers the produced information, documents, or tangible items that are otherwise properly subject to a claim of attorney-client privilege, work product immunity, or any other protection from discovery. Any subsequent conflict of law analysis shall apply the law most protective of privilege and work product. For avoidance of doubt, nothing in this provision shall prevent any party from challenging another party's designation of information as privileged or subject to the attorney work product doctrine.</p>	<p>empowered to enter such orders on their own initiative or at a party's request. Fed. R. Evid. 502(d), Addendum to Advisory Committee Notes. As other district courts in this Circuit recognize, comprehensive Rule 502(d) orders are favored "in virtually all civil cases ... because they generally save time and money and reduce disputes." <i>Arconic Inc. v. Novelis Inc.</i>, No. 17-1434, 2019 WL 911417, at *3 (W.D. Pa. Feb. 26, 2019). By adopting this Court's preference that a Rule 502(d) order protect <i>all</i> disclosures during production, whether "inadvertent or otherwise," Defendants seek to avoid future disputes about the inadvertency, or lack thereof, of the production of individual documents. Such disputes serve only to sap the Court's resources and to distract the parties from expediently resolving the matters at hand. Plaintiffs' proposed language ("unless deemed by the Court to be a waiver or forfeiture") would nullify the benefits of a Rule 502(d) order and reintroduce the very disputes Rule 502 intended to avoid. Moreover, a broad Rule 502(d) order permits "the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery." Fed. R. Evid. 502(d), Addendum to Advisory Committee Notes. These concerns are particularly acute here because the burden of production falls disproportionately on Defendants in these cases. As made explicit by the last sentence of this paragraph, nothing in Defendants' proposed language prevents Plaintiffs from challenging (or this Court from ruling on) the merits of a claim of privilege, including assertion of a defense that affirmatively waives privilege.</p>

The enclosed attachment contains the agreed upon language in the Protective Order, along with two versions of paragraph 19 for the Court's consideration.

Respectfully yours,

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